

**Mueller Energy Services, Inc. and International Union of Operating Engineers, Local Union No. 17.**  
Cases 3-CA-20542-1R and 3-CA-20542-2R

February 6, 2001

**DECISION AND ORDER**

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN  
AND WALSH

On May 4, 1998, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

Finding that the Respondent had timely filed a brief with the judge, but that the judge had not received the brief, the Board, by unpublished Order issued February 12, 1999, remanded the proceeding to the judge for her to reconsider the issues, the record, and her decision in light of both the Respondent's and the General Counsel's briefs. On May 14, 1999, the judge issued the attached supplemental decision, in which she reconsidered her prior decision as directed and reaffirmed the findings of fact and conclusions of law set forth in that decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions<sup>1</sup> and to adopt the recommended Order.

<sup>1</sup> The judge found, inter alia, that the Respondent violated Sec. 8(a)(1) of the Act by soliciting employees, in its second letter dated February 27, 1997, to resign from Local 17. In its exceptions, the Respondent cites cases such as *Ace Hardware*, 271 NLRB 1174 (1984); *Perkins Machine Co.*, 141 NLRB 697 (1963); *Cyclops Corp.*, 216 NLRB 857 (1975); *University of Richmond*, 274 NLRB 1204 (1985); and *Mari-rosa Press*, 273 NLRB 528, 529 (1984), for the proposition that an employer may lawfully inform employees of their right to revoke their authorization cards (including supplying information and forms) even if employees have not solicited such information, as long as the employer does not attempt to ascertain if employees avail themselves of the right, nor offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from revocation. Here, as the judge found, the Respondent did more than merely inform the employees of their right to revoke their Local 17 authorization cards. The Respondent's first letter to employees, also dated February 27, 1997, contained an unlawful threat of job loss for those employees who sign with Local 17. Thus, the Respondent created a situation in which the employees would tend to feel peril in refraining from revoking their cards. In these circumstances, the Respondent could not lawfully inform its employees of their right to revoke their authorization cards. Accordingly, we agree with the judge that the Respondent's solicitation of resignation from Local 17 violated Sec. 8(a)(1) of the Act.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mueller Energy Services, Inc., West Seneca, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*William F. Trezevant, Esq.*, for the General Counsel.

*Roger L. Sabo, Esq. (Schottenstein, Zox & Dunn)*, of Columbus, Ohio, for the Respondent.

*Catherine Nugent, Esq.*, of Cheektowaga, New York, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Buffalo, New York, on October 14, 1997. The Complaint alleges that Respondent Mueller Energy Services, Inc., in violation of Section 8(a)(1) of the Act, interfered with its employees' rights by the issuance of two documents. Respondent denies that it engaged in any violations of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel on December 17, 1997, I make the following<sup>1</sup>

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a corporation with an office and place of business in West Seneca, New York, is engaged in providing gas line services. Annually, Respondent provides services valued in excess of \$50,000 to enterprises directly engaged in interstate commerce. I find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act and that International Union of Operating Engineers, Local Union No. 17, is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

*A. Background*

Respondent's employees install pipelines for various local gas companies. The employees are represented by Local 8-215 of the Oil, Chemical, and Atomic Workers. In February 1997, Local 17 of the International Union of Operating Engineers was conducting an organizing campaign among Respondent's employees.

*B. Supervisory Status*

The instant case arises from the distribution of two documents by an employee of Respondent. The General Counsel asserts that the documents were issued by a supervisor and that they contained matter which violated employees' Section 7

<sup>1</sup> The record is hereby corrected so that at p. 135, L. 6, it reads, "Pat was staying more in the office, Paul was going out in the field."

rights. The Respondent disputes the supervisory status of the employee who issued the documents and disputes their effect.

The documents at issue herein were signed by Paul Gotto, a former employee of Respondent, who did not testify herein. Prior to the opening of the hearing, the General Counsel had subpoenaed from Respondent certain records which might have shed light on Gotto's status. Although directed to produce the records in a ruling on Respondent's petition to revoke the subpoena, Respondent did not produce these records at the hearing. I therefore permitted General Counsel to introduce secondary evidence concerning Gotto's alleged supervisory status. Bradley Olson, the president of Respondent, testified that four field managers report to him. All the crew members, including foremen, operators, laborers, and others report to the field managers. The field managers have the authority to hire and fire employees, they effectively recommend raises for employees and they grant time off to employees. In addition, Respondent's job description for field managers shows that they assign employees and evaluate employees. I find that the field managers are supervisors within the meaning of Section 2 (11) of the Act.

Olson testified that Paul Gotto was a field manager in the Buffalo area. Olson hired Gotto in the third week of February 1997, to replace departing field manager Pat Patterson.<sup>2</sup> According to Olson, there was a period between the third week of February and the first or second week of March when Patterson remained on the job to take Gotto around, show him his duties, and introduce him to employees. Olson stated that Gotto exercised managerial authority and issued instructions to the employees every morning even while Patterson remained on the job. Employee David Saviano testified that at some point, both Patterson and Gotto were supervising employees; Gotto laid off Saviano in the first week of March 1997. Employee Todd Coppola testified that in February 1997, he reported to Gotto and followed his instructions. Gotto told Coppola how he wanted the jobs done and Coppola went to Gotto with his problems. During this time Patterson was backing out of his job and transferring everything to Gotto. I conclude that Gotto exercised supervisory authority within the meaning of Section 2 (11) of the Act from the time he was hired in February 1997.

### *C. Content of the Letters*

On February 27, 1997, Gotto issued a letter, which was distributed to employees in the field by the foremen. The document read in its entirety as follows:

To All MES, Inc. Employees,

As you all may have heard, operating engineers have been confronting various individuals within our company regarding signing up with the Operating Engineers, Local 17.

Mueller Energy Services, Inc. as you know has a ratified agreement with the Oil, Chemical and Atomic Workers Union, Local 8-215. Which is affiliated with the AFL-CIO, the largest union organization in the country. (sic) This affiliation has enabled our company to move into areas such as Buffalo, NY, and competitively bid work that is done by mostly non-

union contractors while providing health insurance, a vacation fund and a pension plan for all employees. And keep relatively busy twelve months a year.

Mueller Energy Services, Inc. has been successful in part to our union organization and intends to continue to recognize the OCAW as our union affiliate. (sic) Therefore those who choose to sign up with Local 17 should make sure they have a place of employment when they do, because as OCAW members, we will in no way hire building trades union members, nor will we ever. Signing with Local 17 will just get you a union card and a seat at the union hall waiting for a place of employment and waive your rights under the agreement that Mueller Energy Services, Inc. abides by.

To continue employment at Mueller Energy, my best advice is to refer those persons from Local 17 to your foreman who will in turn refer them to myself. If you have any questions regarding this matter, feel free to ask me.

Sincerely,

Paul Gotto

PG/pp

Olson stated that the two sets of initials at the bottom of the letter belonged to Gotto and Patterson.

Olson testified that Gotto had not been authorized to send this letter. When Olson learned of the letter, he directed Gotto to send another letter. This second letter, also dated February 27, 1997, and addressed to all Union employees, read as follows:

We understand from comments of several employees that you have been approached by representatives of Local 17 and to sign authorization cards for that union. (sic) We also understand that you have been promised you will get more money if you join Local 17.

We want to emphasize a few points that are obviously not being made clear by representatives of Local 17 in this matter.

1. Our company has a contract with the Oil, Chemical, and Atomic Workers Union . . . Local 17 cannot change the terms and conditions of employment. . . .
2. As an OCAW union contractor, this company could not bargain with Local 17 if it wanted to. . . .
3. As a member of this company, you are obligated to the union shop clause negotiated by this company with the OCAW . . . If you do not tender your periodic dues, you can be subject to discharge for failure to do so.
4. If Local 17 is telling you they can get you better wages, then it would have to be with another company. If they are talking about a job with one of their union employers, it is not likely to be in the gas industry. . . .
5. Local 17 is a craft union. . . . Unless and until one becomes a journeyman within Local 17, one receives wages as an apprentice. . . .
6. We understand and appreciate that Local 17 has been at our doorstep because of a dispute they have with a contractor across the street, Arbys. . . .

<sup>2</sup> Gotto ceased working for Respondent in July 1997.

7. In addition to promising higher pay, we understand the representatives of Local 17 have stated that unless you sign with them, you will be subject to strikes and picketing. . . . This company will not allow anyone to act in such a fashion. . . .

8. If you wish to remain a member of Local 17 and seek employment opportunities that they offer, we would request that you give us at least two weeks advanced notice. . . .

Clearly Local 17 has not told you the complete story. Part of the story they did not tell you is that you are free to resign from a union. That is, you can simply advise Local 17 that you are resigning from their union. It is a simple letter and we enclose a sample that you could send directly to that union. We express no opinion as to whether you should do so. . . . But, since we will continue to abide by our agreement with the OCAW which requires membership in their union, we see no reason you need to belong to two unions if you wish to remain working for our company.

The next page of this letter is a sample membership resignation and authorization card revocation form addressed to Local 17.

The first letter addressed to employees by supervisor Gotto and bearing the initials of Gotto and supervisor Patterson told employees that if they sign up with Local 17 they will not be hired by Respondent, but instead will have to find another job through the Local 17 union hall, and they will have waived their rights under the applicable collective bargaining agreement between the OCAW and Respondent. This language constitutes a direct threat that employees who join Local 17 will lose their jobs with Mueller Energy Services. Respondent thus violated Section 8 (a) (1) of the Act. Further, the first letter told employees that to continue employment at Mueller Energy they should refer persons from Local 17 to a foreman who would in turn refer them to Gotto. This statement clearly conditions continued employment upon reporting persons engaged in concerted activities to supervisors. Respondent thus violated Section 8 (a) (1) of the Act. *Eastern Maine Medical Center*, 277 NLRB 1374-5 (1985).

The second letter addressed to employees by Gotto pursuant to the direction of president Olson told employees that Respondent was aware that they had been approached by representatives of Local 17 and asked to join that Union. By this language Respondent created an impression among its employees that their union activities were under surveillance. Respondent thus violated Section 8 (a) (1) of the Act. Finally, the second letter told employees that they had no need to belong to Local 17 since they were subject to a union shop membership requirement with the OCAW and the letter provided employees with a sample resignation form to send to Local 17. Respondent did not merely provide employees with information relating to union resignation, but by threatening employees in its first letter issued on February 27, that they would lose their jobs if they signed up with Local 17. Respondent created a situation in which employees would tend to feel imperiled should they refrain from resigning. Therefore, the statements relating to resignation from Local 17 constituted unlawful solicitation of resignation from union membership in violation of Section 8 (a)

(1) of the Act.. *Schenk Packing Co.*, 301 NLRB 487, 489 (1991).

At the instant hearing, Respondent contended that the second letter in some way remedied the violations contained in the first letter. This contention does not merit serious consideration. In order for the second letter effectively to repudiate the first letter it would have had to be specific and unambiguous with respect to disavowing the coercive language in the first letter and it would have had to assure employees that in the future Respondent would not interfere with the exercise of their statutory rights. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

#### CONCLUSION OF LAW

By threatening employees that if they joined Local 17 they would lose their jobs and waive their rights under the existing collective-bargaining agreement, by conditioning continued employment upon reporting persons engaged in concerted activities to supervisors, by creating an impression among employees that their union activities were under surveillance, and by unlawfully soliciting employees to resign their membership in Local 17, Respondent violated Section 8 (a) (1) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Mueller Energy Services, Inc., West Seneca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that if they join Local 17 they will lose their jobs and waive their rights under the existing collective bargaining agreement, conditioning continued employment upon reporting persons engaged in concerted activities, creating an impression that the union activities of employees are under surveillance and unlawfully soliciting employees to resign their membership in Local 17.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in West Seneca, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with loss of your job and waiver of your rights under the existing collective-bargaining agreement if you join International Union of Operating Engineers, Local Union No. 17.

WE WILL NOT condition your continued employment upon reporting persons engaged in concerted activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT unlawfully solicit you to resign your membership in Local 17.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MULLER ENERGY SERVICES, INC.

*William F. Trezevant, Esq.*, for the General Counsel.

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

*Roger L. Sabo, Esq. (Schottenstein, Zox & Dunn)*, of Columbus, Ohio, for the Respondent.

*Catherine Nugent, Esq.*, of Cheektowaga, New York, for the Charging Party.

#### SUPPLEMENTAL DECISION

#### STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. On February 12, 1999, the National Labor Relations Board remanded the above-captioned proceeding to me, ordering that I shall prepare and serve on the parties a Supplemental Decision containing findings of fact, conclusions of law, and a recommended Order. The purpose of the remand was so that I could reconsider the issues, the record and my prior decision in this proceeding in light of the Respondent's and the General Counsel's briefs. The Board found that although the Respondent had timely filed a brief with me I did not receive the brief and I was thus unable to consider it in issuing my prior decision in the instant matter.<sup>1</sup>

Upon reconsideration of the issues, the record and my prior decision in light of the Respondent's brief and the General Counsel's brief, I make the following

#### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a corporation with an office and place of business in West Seneca, NY is engaged in providing gas line services. The Respondent admits that annually it provides services valued in excess of \$50,000 to National Fuel Gas Company. The Complaint alleges that National Fuel Gas Company is an enterprise directly engaged in interstate commerce which meets a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow. The Respondent's Answer denies this allegation "for want of knowledge." The record shows that the Respondent works for National Fuel Gas Company in New York State installing and maintaining distribution gas lines. In *National Fuel Gas Distribution Corp.*, 308 NLRB 841 (1992), the Board found that National Fuel Gas Distribution Corp., a wholly owned subsidiary of National Fuel Gas Company, is a public utility incorporated in New York State and engaged in the purchase, distribution and retail sale of natural gas. The utility has a principal office and place of business in Buffalo, New York, and various facilities throughout New York State and Pennsylvania. The Board found that the utility is an employer engaged in commerce within the meaning of the Act. I find that the General Counsel has made a *prima facie* showing that the Respondent herein is an employer under the Act, and that the Respondent has not provided any facts to the contrary. Respondent's conjecture, stated in its brief, that there may have been changed circumstances in the status of National Fuel Gas Company since 1992 does not amount to a showing that in fact there have been changes. I adhere to the finding in my prior decision that the Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> My prior decision, JD(NY)-28-98, issued May 4, 1998.

## II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent's brief urges that because its employees were covered by a contract with the OCAW it was not unlawful for it to tell its employees that they could not join Local 17. The Respondent urges that because Local 17 could not become the employees' bargaining agent at the time the alleged unfair labor practices occurred, its statements to employees were not coercive. Manifestly, the Respondent's employees were entitled to join any union they wished. The fact that Local 17 could not represent employees during the time at issue does not entitle the employer to threaten employees with loss of employment and benefits under the existing contract if they should decide to join Local 17. None of the Respondent's other unlawful statements to its employees were privileged by the fact that Local 17 could not be certified to represent the employees.

All of the other arguments contained in the Respondent's brief address issues that were discussed in my prior decision. My view of the facts remains the same after a review of the record in light of the Respondent's brief. It is not necessary to repeat the prior factual and legal discussion here and I adhere to the findings of fact made in my prior decision.

## CONCLUSION OF LAW

By threatening employees that if they joined Local 17 they would lose their jobs and waive their rights under the existing collective-bargaining agreement, by conditioning continued employment upon reporting persons engaged in concerted activities to supervisors, by creating an impression among employees that their union activities were under surveillance, and by unlawfully soliciting employees to resign their membership in Local 17, the Respondent violated Section 8 (a) (1) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Based on my reconsideration of the issues, the record, and my prior decision in light of the Respondent's brief and the General Counsel's brief, I issue the following recommended<sup>2</sup>

## ORDER

The Respondent, Mueller Energy Services, Inc., West Seneca, New York, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Threatening employees that if they join Local 17 they will lose their jobs and waive their rights under the existing collective-bargaining agreement, conditioning continued employment upon reporting persons engaged in concerted activities, creating an impression that the union activities of employ-

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ees are under surveillance and unlawfully soliciting employees to resign their membership in Local 17.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in West Seneca, New York, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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WE WILL NOT threaten you with loss of your jobs and waiver of your rights under the existing collective bargaining agreement if you join International Union of Operating Engineers, Local Union No. 17.

WE WILL NOT condition your continued employment upon reporting persons engaged in concerted activities.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT solicit you to resign your membership in Local 17.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MULLER ENERGY SERVICES, INC.